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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 FEDERAL TRADE COMMISSION and
4 PEOPLE OF THE STATE OF NEW
5 YORK, by Letitia James,
6 Attorney General of the State
7 of New York,

8 Plaintiffs,

9 v.

10 17 CV 124 (LLS)

11 QUINCY BIOSCIENCE HOLDING
12 COMPANY, INC., *et al.*,

13 Defendants.

14 Jury Trial

15 New York, N.Y.
16 February 21, 2024
17 10:56 a.m.

18 Before:

19 HON. LOUIS L. STANTON,

20 District Judge
21 -and a jury -

22 APPEARANCES

23 EDWARD GLENNON
24 TIFFANY WOO

25 ANDREW D. WONE

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(In the robing room)

THE COURT: What is the problem about the FTC advertising guide?

MS. WISE: Your Honor, this is Tamar Wise, for the defendants.

We filed this letter last night.

THE COURT: I just read it.

MS. WISE: Great. We just -- nothing further than what's in the letter. We wanted to just make sure there were no objections.

THE COURT: All right. I'll hear the other side.

MS. MATUSCHAK: Your Honor, defendants have been on notice, but we do not think the evidence and argument related to the Dietary Supplement Guide is admissible. It's not relevant to the case. And they've been on notice of that for a long time. This is not an eve-of-trial surprise.

THE COURT: Hmm?

MS. MATUSCHAK: This is not an eve-of-trial surprise for them because they know that it's not on the joint exhibit list, and they know that we filed a motion *in limine* seeking to exclude any use of the Dietary Supplement Guide. So they have been on notice that we would oppose, and we intend to oppose, if they seek to introduce any evidence or argument related to the guide.

THE COURT: Well, it couldn't be a surprise because

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1 there's been so much discussion about that item for months and
2 years now. So I'm unimpressed by the claim of surprise. I'm
3 somewhat disappointed if there's a shifting of positions, but
4 it's still possible. The trial hasn't started, and what is it
5 that you're going to do? Do you object to its use of one of
6 your client's guidance publications?

7 MS. MATUSCHAK: Well, I do object to its use. I am
8 Kate Matuschak with the New York Attorney General. So this is
9 not a guidance that was issued by my agency.

10 THE COURT: That's true. Your co-plaintiffs.

11 MS. MATUSCHAK: Yes. But it's also just -- it's not
12 relevant to any issue in the case. And you can see --

13 THE COURT: How can it not be? It's an explanation by
14 the government of how to do to its satisfaction something which
15 a citizen is trying to do, and there was a large enough segment
16 of the population that they thought it should be addressed to
17 all of them and published. It may have become outdated, but it
18 is the guidance that they gave then. What is irrelevant about
19 it?

20 MS. MATUSCHAK: Well, the guidance is being sought --
21 the defendants are seeking to use the guidance to establish
22 what the law is. The law is that competent and reliable
23 scientific evidence is needed to substantiate advertising
24 claims, and the basis for that requirement is the law. It is
25 not the guidance. So to the extent that defendants intend to

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1 use the guidance to say what was required to support the claims
2 in this case, that is using the guidance to explain what the
3 law is.

4 The second way in which defendants seek to use it is
5 to have their fact witnesses say they designed their
6 advertising around -- in reliance upon this guidance, so that
7 goes to good faith. And that is also not an issue before the
8 jury. There's no other permissible use for the --

9 THE COURT: When was this guidance revoked?

10 MR. GLENNON: It wasn't revoked. The FTC did issue an
11 updated version basically setting forth the same principles
12 that the initial guidance did. I believe it was actually 2023.

13 MR. CASTELLO: December 2022, your Honor.

14 THE COURT: Thank you. What happened then?

15 MR. CASTELLO: They revised the guideline, your Honor
16 after almost 25 years of its existence.

17 THE COURT: Well, I think that's part of the story.
18 And it should be told with the rest of it. But --

19 MR. GLENNON: Well, we were not planning to introduce
20 the revised guidance. Defendants actually, I think, took
21 issue, did not want us to bring up the revised guidance. So we
22 were not -- we don't think the guidance either is relevant at
23 all for the reasons -- in terms of expert witnesses, the
24 experts in this case, the Court in its order and *Daubert* said
25 that the critical issue -- whether there's scientific support

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1 for the claims. And that has nothing to do with the guidance.

2 The guidance doesn't talk about memory or cognition or
3 what you need to do, you know, in those fields to support a
4 claim for efficacy for those specific scientific fields. So
5 expert testimony about the guidance is completely irrelevant.
6 And it basically amounts to an explanation of the law, you
7 know, in the scientific experts' view, did these clients -- did
8 these defendants, comply with the FTC Act, essentially. And
9 that's irrelevant. That's also offering a legal opinion.

10 MS. WISE: Your Honor, if I may respond?

11 THE COURT: Sure.

12 MS. WISE: A few points. First of all, it's quite
13 disingenuous for the plaintiffs to now say that the guidance is
14 not relevant to this case. They included it as part of the
15 joint stipulated facts in this case. The guidance is quoted in
16 their jury instructions. So they've adopted -- first of all,
17 as your Honor noted the FTC authored it, the FTC is one of the
18 plaintiffs in this case, and the New York Attorney General
19 adopted it. These are party admissions in this case. The
20 New York Attorney General has relied on the case law
21 interpreting the guidance in support of the claims in this
22 case.

23 I don't think that's funny.

24 MS. MATUSCHAK: I'm sorry. I think it's funny because
25 case law doesn't interpret the guidance. Case law interprets

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1 the law. Case law applies the law. The source of the law is
2 the regulations and statutes. Okay?

3 THE COURT: Is there any difference between the
4 guidance and the law, any difference of substance?

5 MS. MATUSCHAK: Yes. Yes, your Honor. The guidance
6 goes into great detail, and it is intended to give advice to
7 industry, but it is not a legally binding document. And what
8 defendants are intending to do here is to use the guidance to
9 say what the law is, and that's inappropriate because it is --
10 you know, as the Court has already ruled --

11 THE COURT: Let me oversimplify.

12 I'm a citizen trying to comply with the law, the law
13 is the law, and nothing else is the law. But my government
14 nicely writes me a letter telling me how I can best comply with
15 the law, which I say thank you and follow and intend to do and
16 rely on. Later, the law was changed in some slight degree, and
17 the advice went out of date, but it is part of the history, it
18 is part of the record, and it is part of what the government
19 told the citizen would satisfy the government. And to claim
20 that's irrelevant is simply unreasonable.

21 MR. GLENNON: Well, your Honor --

22 MS. WISE: I didn't finish my -- if I could please
23 continue.

24 THE COURT: Well, anyway, the answer is they can use
25 it the way they're proposing to use it.

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1 MS. MATUSCHAK: Can I just ask, your Honor, to the
2 extent that they use it the way they're proposing to use it,
3 they will give the impression to the jury that they, you know,
4 that this is what the law is, even though --

5 THE COURT: Well, you can explain it to them, and I
6 will explain to them any time you ask me, that it is not the
7 law, it's merely a way to comply with the law.

8 MS. MATUSCHAK: Well, your Honor, I think that's
9 essentially equivalent. To comply with the law, you are to --

10 THE COURT: Well, to that extent the guidance is
11 equivalent --

12 MS. MATUSCHAK: Well, your Honor, but the New York
13 Attorney General did not issue the guidance. The New York
14 Attorney General is not bound by the guidance. It's not bound
15 by case law regarding the guidance. The New York
16 Attorney General goes to case law regarding the FTC Act and any
17 regulations thereunder. It is not under any sort of guidance
18 that the FTC unilaterally issues.

19 MR. CASTELLO: Your Honor -- if I may, your Honor.

20 THE COURT: I think this is a debate that will be
21 seized with more interest by the Court of Appeals than I am
22 giving it. To me, it seems open and shut.

23 MR. GLENNON: Your Honor, defendants aren't -- they
24 haven't offered a reasonable reliance defense in this case, nor
25 could they. So, again, as the Court identified, the critical

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1 issue is whether there is scientific support to back up the
2 advertising claims.

3 What the defendants did, what they looked at to the
4 guidance, whether they did, is, in fact, irrelevant. That
5 might be part of the historical context of what they did, but
6 the prejudice that I think that the jury will take away, that
7 good faith, they made a good effort, they looked at what the
8 government told them and, hey, if they did, they should get
9 off, and that's not the case. Good faith is not an issue for
10 liability.

11 THE COURT: How does it injure your case for them to
12 use it?

13 MR. GLENNON: Well, again, I think there's a danger
14 that the jury will think that good faith, if their fact
15 witnesses testify as to how they looked at the guide, they did
16 their best, they looked to what the government told them in
17 developing their substantiation and their claims. We thought
18 we complied with everything in this guidance. There's a very
19 real danger the jury will say, well, that's good enough, they
20 shouldn't be sued, they shouldn't be held liable for that, if
21 they looked at the guidance. But that is not a relevant issue.

22 THE COURT: Did they comply with the guidance?

23 MR. GLENNON: Not in our view, no.

24 THE COURT: Excuse me?

25 MR. GLENNON: No, we don't believe that they have

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1 scientific support for their claims, and that is the
2 ultimate --

3 THE COURT: Oh, I see.

4 MR. GLENNON: Yeah.

5 THE COURT: That goes back to the core question.

6 MR. GLENNON: Right.

7 THE COURT: Okay. Well, they can use it.

8 MS. MATUSCHAK: Thank you.

9 MR. CASTELLO: Thank you, your Honor.

10 THE COURT: As far as it reaches. And you can point
11 out that it doesn't reach very far, but it is part of the
12 story.

13 (Recess)

14 (Jury selection followed)

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1 (Jury present)

2 THE COURT: Members of the jury, I have probably 10 or
3 12 minutes' worth of instructions about the trial and that will
4 finish up our day I think. Mr. Lee will want to get some
5 information from you in the jury room after that, but that's
6 quick. And then we'll resume tomorrow morning with the opening
7 statements from the lawyers and then the evidence from the
8 witnesses. And I just want to tell you about what will be
9 happening when we're doing the trial, which will be starting
10 tomorrow. Actually it started today. But I want to describe
11 how it will be conducted and explain what we'll be doing, you
12 and I and the lawyers for both sides. At the end of the trial,
13 I'll give you more detailed guidance on how you're to go about
14 reaching your decision. But now, I simply want to explain how
15 the trial will proceed and the jobs that you and I are to
16 perform during a trial. As I said, it will take ten or 15
17 minutes.

18 I'll decide which rules of law apply to this case.
19 I'll decide this in response to questions raised by the lawyers
20 as we go along and in the final instructions given to you after
21 the evidence and arguments are completed.

22 It's your function in this case to decide the issues
23 of fact. Your decision on the issues of fact is to be based
24 solely on evidence. Nothing I say is evidence. Nothing any of
25 the lawyers say is evidence. Questions by themselves are not

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1 evidence. The evidence consists of the sworn testimony of the
2 witnesses and of the exhibits which will be received in
3 evidence for your consideration.

4 Anything you may have seen or heard outside the
5 courtroom is not evidence and must be disregarded. You're to
6 decide the case solely, only, on the evidence presented here in
7 the courtroom.

8 How do you decide what to believe and what not to
9 believe? Listen to the witnesses, watch them, observe them,
10 and then decide whether you believe them or disbelieve them, or
11 credit some parts of what they say and other parts the same way
12 that you decide such questions in your ordinary life. Did they
13 know what they were talking about? Do they have a reason to
14 falsify or distort or minimize their testimony? Use your
15 common sense and your good judgment to evaluate their testimony
16 based on all of the circumstances.

17 The best test for evidence is how well it comports
18 with the other evidence. If it stands alone and in contrast to
19 them, then it will need sufficient support for you to give it
20 credence.

21 It's very important that you keep an open mind
22 throughout this case. Don't form any judgments until the
23 evidence is concluded and the case is given to you to discuss
24 and decide. Remember that the evidence comes in step by step.
25 First, a witness testifies on direct examination. Then, the

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1 other side has the opportunity to cross-examine him or her.
2 First, one side presents its evidence and then the other side
3 has an opportunity to present evidence.

4 Remember that there may be two or more sides to any
5 story. And remember how when you were a child, something that
6 you heard towards the end of a story changed your whole
7 understanding of everything that had gone before. You can't
8 make up your mind about what you believe until you've heard all
9 of it and can evaluate all of it.

10 From one or two facts you find to have been proved,
11 you may infer some other fact existed. An inference is not a
12 suspicion and it's not a guess. It's a reasonable, logical
13 deduction on the basis of facts that you find to have been
14 proved that some other fact occurred or did not occur. But you
15 will not be in a position to form any judgment as to what you
16 believe until you've heard all of the evidence in this case and
17 discussed it with your fellow jurors. Often, you get a lot of
18 insight that hadn't occurred to you from the discussion. It's
19 a learning process as well as a decision process.

20 During the course of the trial, you shouldn't talk
21 with any witness or with any of the parties or with any of the
22 lawyers in the case. Please do not talk with any of those
23 people about any subject at all. They're not allowed to talk
24 with you. And if you see them in the hall or pass them and go
25 up in an elevator or whatever, and they see you, they see you.

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1 They know you're there and they ignore you, and they're not
2 being rude. They're only acting properly and they expect you
3 to understand that that's what's going on.

4 In addition, during the trial you shouldn't talk about
5 the trial with anyone else. Not your family, not your friends,
6 not the people you work with, and not the media.

7 Also, you should not discuss this case among
8 yourselves until after I've instructed you on the law and you
9 have gone to the jury room to make your decision at the end of
10 the trial. It's important that you wait until all of the
11 evidence is received and you've heard my instructions on the
12 rules of law which apply to this case before you even start to
13 discuss it among yourselves. Keep your opinions to yourselves
14 and you're free to change them from time to time with nobody
15 knowing. I sat as a juror on a case and I thought it was quite
16 a luxury to be able to keep my own thoughts to myself and
17 change them when I heard something further.

18 I assume that many of you use cell phones, the
19 internet, and other technology. You must not use these tools
20 to communicate with anyone about the case. This includes your
21 family and friends. You may not communicate with anyone about
22 the case on your cell phone, through phone calls, e-mail, text
23 messaging, any blog or website or internet chatroom, or by way
24 of any other social networking website, including Facebook,
25 Instagram, LinkedIn, X formerly known as Twitter, TikTok,

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1 YouTube, or anything of that nature.

2 After you retire to deliberate, you will discuss the
3 case with your fellow jurors, but you cannot discuss the case
4 with anyone else, including the media, until you have returned
5 a verdict and the trial is at an end. Then you are restored to
6 all your rights of free speech.

7 Let me add that during the course of the trial, you
8 will receive all the evidence that you can properly consider to
9 decide the case. Because of this, you should not attempt to
10 gather any information on your own which you might think would
11 be helpful. Don't engage in any outside reading on any of the
12 topics that come up in this case. Do not attempt to visit any
13 of the places that are referred to. Don't check files or
14 sources of any nature, and don't in any other way try to learn
15 about the case outside the courtroom. The reason for this
16 rule, and it is a rule that you must follow, is that your
17 verdict must be based only on the evidence produced in the
18 courtroom.

19 Now, trial procedure. First, starting tomorrow
20 morning the lawyers have the opportunity to make opening
21 statements to you. These statements are not evidence. They
22 serve no purpose other than to give you an idea in advance of
23 the evidence of what the lawyers expect you to hear from the
24 witnesses. These statements permit the lawyers to tell you a
25 bit about what the case is all about, but the evidence comes

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1 only from the witnesses and the exhibits.

2 After opening statements, we'll start hearing the
3 testimony of the witnesses. Probably most of them experts in
4 one field or another germane to the issues.

5 Remember that the lawyers present the evidence to you.
6 They ask questions, but they don't give evidence themselves.
7 Objections to questions are not evidence either. Lawyers have
8 an obligation to their client to make an objection when they
9 believe something being offered is improper under the rules of
10 evidence. They're not being obstructive when they object.
11 It's their duty and you shouldn't be influenced by the
12 objection or by my ruling on it.

13 If the objection is sustained, ignore the question.
14 Don't try to guess what the answer would have been if the
15 witness had been allowed to answer. If the objection is
16 overruled, treat the answer like any other. If you're
17 instructed that some item of evidence is received for a limited
18 purpose only, then follow that instruction and use it only for
19 that purpose. Testimony that I exclude or tell you to
20 disregard is not evidence and you must not consider it or refer
21 to it in your deliberations on your verdict.

22 After all the evidence is received, the lawyers have
23 an opportunity to sum up and make their closing arguments to
24 you. They may review the evidence and suggest what conclusions
25 they think you should draw from it. Remember that these

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1 summations, again, are not evidence. You may find it very
2 helpful, but it is only argument. And after the summations,
3 I'll instruct you on the rules of law that you're to use in
4 reaching your verdict.

5 For the moment I'll just say that a party with the
6 burden of proof must prove the claim by a preponderance of the
7 evidence. This burden of proof by a preponderance of the
8 evidence is different from the burden on the government in a
9 criminal case where the prosecution's allegations must be
10 proven beyond a reasonable doubt.

11 A preponderance of the evidence means that if after
12 hearing all of the evidence you believe it more likely than not
13 that some event occurred, that event has been proven to you by
14 a preponderance of the evidence. If you believe it more likely
15 that it did not occur, then it has not been proved. And if you
16 find the likelihood evenly balanced, maybe yes, maybe no, then
17 the party with the burden of proving that event has not
18 succeeded.

19 Following my instructions, you'll go into the jury
20 room, review the evidence, review the exhibits, and discuss the
21 evidence among yourselves. Based on that evidence and your
22 discussions of it, you'll determine your verdict. Your
23 deliberations will be secret and you will never have to explain
24 your verdict to anyone.

25 I think now we'll recess for the day. Mr. Lee has

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1 some information he needs from you and we'll get in the jury
2 room. If you haven't been in the jury room, you will notice
3 one of the great views of Manhattan. It's really very
4 attractive. We have trouble making the juries go home at
5 night. They want to look at that view.

6 We'll resume at 11:00 in the morning. Welcome aboard.

7 THE DEPUTY CLERK: All rise.

8 (Continued on next page)

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(Jury not present)

THE COURT: Good evening. Have a good evening. See
you tomorrow.

(Adjourned to February 22, 2024, at 11:00 a.m.)

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